**IN THE HIGH COURT OF JUDICATURE AT BOBBY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**CUSTOMS APPEAL NO.22 OF 2004**

Commissioner of Customs (Import)
Air Cargo Complex, Sahar,
Andheri (E), Mumbai - 400 038. ..Appellant.

V/s.

M/s.Wockhardt Hospital & Heart
Institute, Shariff Chambers,
14, Cinningham Road,
Bangalore - 560 052. ..Respondent.

Mr.S.S.Pakale with Mr.R.C.Master i/b. Dr.T.C. Kaushik for the appellant.

Mr.E.P.Bharucha, senior counsel with Mr.M.P.Baxi & Mr. Gaurav Agarwal i/b. M/s.Harish Joshi & Co. for the respondent.

**AND**

**CUSTOMS APPEAL NO.17 OF 2005**

Commissioner of Customs (Import)
Air Cargo Complex, Sahar,
Andheri (E), Mumbai - 400 099. ..Appellant.

V/s.

M/s.Grant Medical Foundation,
Ruby Hill Clinic, 40 Sasson Road,
P.O. Box No.70, Pune - 411 001. ..Respondent.

Mr.S.S.Pakale with Mr.R.C.Master i/b. Dr.T.C. Kaushik for the appellant.

Mr.V.Shreedharan with Mr.Prakash Shah & Mr.Bharat Raichandani i/b. M/s. PDS Legal for the respondent.

**CORAM : R.M.LODHA AND**
**J.P.DEVADHAR, JJ.**

**DATED : 28TH APRIL, 2006.**

**ORAL JUDGMENT (PER J.P.DEVADHAR, J.)**

1. These two appeals are filed by the revenue under Section 130 of the Customs Act, 1962. Since the issue involved in these appeals are common, both these appeals are heard together and disposed of by this common Judgment.

2. These appeals are filed against the orders passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Branch at Mumbai ('the Tribunal' for short) on 13/2/04 and 13/8/04 respectively. The question before the Tribunal was, where the imported goods cleared without payment of duty under a conditional exemption notification are confiscated with an option to pay fine in lieu of confiscation and if the option is not exercised by the owner, whether the revenue is entitled to recover customs duty payable on such goods ? The Tribunal held that on confiscation, the goods vest in the government and the liability to pay duty under section 125(2) of the Customs Act, 1962 would arise only if the owner opts to redeem the goods by paying the redemption fine. As the owners in these two cases have not opted to redeem the goods, the Tribunal held that the customs duty is not payable.

Challenging the aforesaid orders, the revenue has filed these appeals.

3. Undisputed facts in Customs Appeal No.22 of 2004 are that M/s.Wockhardt Hospital and Heart Institute ('Institute' for short) runs a hospital at Bangalore. Some time in the year 1990, the Institute imported a Cardiac Catherization Laboratory (known as Angiography system) with its spares / accessories valued at Rs.1,14,23,471/- and sought duty free clearance under notification NO.64/88-cus. dated 1/3/1988.

4. Notification No.64/88-cus dated 1/3/1988 issued under section 25 of the Customs Act, 1962 provided that the hospital equipments imported by the Charitable Hospitals certified by the Director General of Health Services, New Delhi ('DGHS' for short) will be exempt from payment of whole of the basic customs duty as well as whole of the additional duty subject to the condition that the Hospitals :

(a) shall give free treatment, on an average, to at least 40% of all their outdoor patients.

(b) shall give free treatment to all indoor patients belonging to families with an income of less than Rs.500/- per month and to keep for this purpose at least 10% of all the hospital beds reserved for such patients and,

(c) shall give treatment at reasonable charges, either on the basis of the income of all the patients concerned or otherwise, to patients other than those specified in clause (a) and (b) above.

5. The Institute obtained the requisite Customs Duty Exemption Certificate (‘CDEC’ for short) from the DGHS to the effect that it is a specified charitable hospital entitled to seek duty free clearance of the medical equipments under the above notification. Accordingly, the equipments imported by the Institute valued at Rs.1,14,23,471/- were assessed and cleared without payment of duty subject to the conditions set out in exemption notification No.64/88.

6. Subsequently, on finding that the Institute has failed to fulfill the conditions of the notification No.64/88-cus dated 1/3/88, a show cause

notice was issued to the Institute on 12/1/2000 under section 124 of the Customs Act, calling upon them to show cause as to why the above goods should not be confiscated under Section 111(o) and penalty under Section 112(a) of the Customs Act, 1962 should not be levied. The Institute filed its reply to the show cause notice. On adjudication, the Commissioner of Customs, by an order-in-original dated 11/7/2002 confiscated the goods under Section 111(o) with an option to redeem the said goods on payment of fine of Rs.1,00,000/- within 30 days of the said order. The Commissioner further directed the Institute to pay forthwith the customs duty amounting to Rs.1,65,24,050/- as the institute failed to discharge the continuing obligation under the notification No.64/88-cus during the material period. The Commissioner imposed penalty of Rs.25,000/- on the Institute under Section 112(a) of the Customs Act, 1962.

7. Being aggrieved by the aforesaid order, the Institute filed an appeal before the Tribunal. By the impugned order dated 13/2/2004, the Tribunal while upholding the confiscation and penalty, held that the duty demand cannot be sustained as the Institute has not exercised the option of redeeming the confiscated

goods. Hence, this appeal.

8. In Customs Appeal No.17 of 2005, M/s.Poona Medical Foundation, Pune, now Grant Medical Foundation ('Foundation' for short) had during the period from January, 1988 to February, 1994 imported medical equipments collectively valued at Rs.3,28,80,008/- and cleared the same without payment of duty under the conditional exemption notification No.64/88-cus by furnishing requisite certificate from the DGHS.

9. By a show cause notice dated 13/12/2000 issued under Section 124 of the Customs Act, the Assistant Commissioner of Customs, Mumbai called upon the Foundation to show cause as to why the medical equipments cleared without payment of duty should not be confiscated under Section 111(o) of the Customs Act, 1962 for violating the conditions of notification No.64/88-cus. The Foundation was further called upon to show cause as to why customs duty amounting to Rs.4,40,31,340/- should not be recovered under Section 28(1) and penalty should not be imposed on them under Section 112 of the Customs Act, 1962. On adjudication, the Commissioner of Customs, Air Cargo Complex, Sahar, Mumbai by an order-in-original dated 18/2/2002, ordered confiscation of the goods mentioned in the said show

cause notice with an option to redeem the said goods on payment of fine of Rs.50,000/-. The Commissioner further confirmed the demand of duty amounting to Rs.4,40,31,340/- and imposed penalty of Rs.10,000/- on the Foundation under Section 112(a) of the Customs Act, 1962.

10. The appeal filed by the Foundation was allowed by the Tribunal by its order dated 13/8/2004. In the said order, it is recorded that the advocate for the foundation has submitted that the owner's were not interested in availing the option to redeem the goods and that the challenge to the confiscation is not being seriously pressed in the appeal and as the penalty imposed has already been paid, the appeal be disposed of accordingly. It is further recorded that the departmental representative contended that even though the owner does not exercise the option of redemption, he is not absolved of the liability to pay duty under section 125(2) of the Customs Act. However, the Tribunal following its decision in the case of **Gautam Diagnostic Centre V/s. Commissioner of Customs (159 E.L.T. 678)** held that on confiscation, the goods vest in the government and if the owner opts to redeem the goods, then only the customs duty becomes payable in addition to the redemption fine. The Tribunal,

accordingly held that in the present case the foundation has not exercised the option and, therefore, the revenue is not entitled to recover duty payable on such goods. Challenging the aforesaid order of the Tribunal, the revenue has filed the present appeal.

11. Customs Appeal No.22 of 2004 was admitted on 13/3/2006 on the following substantial questions of law :

(1) Whether redemption of confiscated Goods by the Importer is a pre-requisite to payment of Demand Duty, when equipments are imported without payment of Customs duty ?

(2) Whether the Tribunal is correct in law in holding that duty is payable only if the importer exercises option of redemption of confiscated goods ?

12. Customs Appeal No.17 of 2005 was admitted on 8/9/2005 on the following substantial questions of law:

(1) Whether in the facts and circumstances of the case the importer is liable to pay

customs duty irrespective of the fact that it may not redeem the goods confiscated several years after their use ?

(2) whether the importers are liable to pay duty which has arisen nor merely because the goods have been confiscated but also because the conditions of the notification have been violated ?

(3) Whether in the facts and circumstances of the case the importer can escape from payment of customs duty which arose due to the violation of post import conditions simply by declining to redeem the goods after they have utilized them for their full life ?

13. Mr.Pakale, learned counsel appearing on behalf of the revenue submitted that under Section 12 of the Customs Act which is a charging section, duties of customs are leviable on all goods which are imported into India. Although the taxable event occurs the moment goods enter the territorial waters of India, it is open to the government to collect the duties of customs leviable under section 12 at any stage without disturbing the essence of tax or rational connection

between the taxes and the persons on whom it is imposed. He submitted that under section 25 of the Customs Act the Central Government is empowered in public interest to grant exemption either absolutely or subject to such conditions to be fulfilled before or after clearance as may be specified in the notification. Where the goods are allowed clearance without payment of duty under a notification subject to the fulfilment of the conditions after clearance, then, the liability to pay customs duty is only suspended or eclipsed. If the owner fails to comply with the conditions attached to the Notification, then the exemption becomes unavailable and full duty becomes payable under section 12 of the Customs Act. In this connection, he relied upon a Judgment of the Kerala High Court in the case of **Aluminium Industries V/s. Union of India** reported in **1984 (16) E.L T. 183 (Ker)**.

14. Mr.Pakale further submitted that in order to earn the benefits of the conditional exemption notification, the owner must fulfil the post clearance conditions attached to the said notification. Once it is established that the said conditions are not fulfilled, the exemption is not earned and consequently the liability to pay full customs duty under section 12 of the Customs Act becomes enforceable. In this

connection, Mr.Pakale relied upon the decision of the Apex Court in the case of **Bombay Oil Industries Pvt. Ltd. V/s. Union of India** reported in **1995 (77) E.L.T. 32 (S.C.)**, **Union of India V/s. Ganesh Metal Processors Industries** reported in **2003 (151) E.L.T. 21 (S.C.) and Commissioner of Customs V/s. Virgo Steels (141 ELT 598)**, the decision of the Karnataka High Court in the case of the **Medical Relief Society V/s. Union of India (111 E.L.T. 327)** and the Larger Bench decision of the Tribunal in the case of **Bombay Hospital Trust V/s. Commissioner of Customs (188 E.L.T. 374).**

15. Relying upon the decisions of the Apex Court in the case of **Mediwell Hospital and Health Care Pvt. Ltd. V/s. Union of India** reported in **1997(89) E.L.T. 425 (S.C.)** and **Commissioner of Customs V/s. Jagdish Cancer and Research Centre** reported in **2001(132) E.L.T. 257 (S.C.)**, Mr.Pakale submitted that where the objective of the exemption notification is not achieved and the obligations attached to the exemption notification are not discharged, then, the Central Government is entitled to enforce realisation of the customs duty from the owner.

16. Mr.Pakale further submitted that under section 125(2) of the Customs Act, the liability to pay customs

duty in addition to the redemption fine is an independent provision and, therefore, even if the owner declines to redeem the confiscated goods the liability to pay customs duty on the confiscated goods continues. In this connection, Mr.Pakale relied upon the decision of the Apex Court in the case of **Union of India V/s. Security & Finance (P) Ltd. (A.I.R.1 1975 S.C. 2288)** and the decision of the Delhi High Court in the case of **Punjab Dairy Development Corporation Ltd. V/s. Union of India** reported in **1987 (30) E.L.T. 241 (Delhi)**. Accordingly, Mr.Pakale submitted that the Tribunal was in error in holding that even after committing breach of the conditions of the notification the owners are not liable to pay customs duty on the ground that the owners have not opted to redeem the goods.

17. Mr.Bharucha, learned senior counsel appearing on behalf of the institute submitted that in the instant case, the show cause notice issued on 12/1/2000 did not seek to recover duty but sought to confiscate the goods and to levy penalty. Therefore, the adjudication order passed by the Commissioner of Customs in demanding duty is beyond the show cause notice and hence bad in law.

18. Mr.Bharucha submitted that the duty under the Customs Act, can be recovered either under section 28 or under section 125 or under the exemption Notification issued under section 25 by specifically providing therein that the duty will be enforced if the conditions of the notification are not fulfilled. In the present case, the duty is not demanded under section 28 because under that section duty could not be demanded beyond the period of five years from the relevant date. Similarly, duty is not claimed under the exemption notification 64/88 because it does not provide for recovery of duty if the conditions attached to the notification are not fulfilled. Mr.Bharucha referred to various exemption notifications issued under the Customs Act, wherein it is specifically provided that the customs duty shall be payable if the conditions of the notification are not fulfilled. In the present case, exemption notification No.64 of 1988 does not contain any clause for recovery of duty if the conditions attached to the notification are violated and hence enforcement of the duty under the exemption notification does not arise.

19. Although section 125(2) of the Customs Act makes the owner liable to pay duty in addition to fine in lieu of confiscation imposed under section 125(1),

the counsel submitted that the said section has no application in the present case. The submission is that where the goods confiscated under Section 111(o) are permitted clearance on payment of fine in lieu of confiscation imposed under section 125(1) then duty as also the fine becomes payable under section 125(2), only if the owner exercises the option to redeem the confiscated goods and not otherwise.

20. According to Mr.Bharucha, section 125(1) deals with three types of goods which can be confiscated, namely (a) goods, imports or exports of which is prohibited and in respect whereof no option of payment of fine in lieu of confiscation has been given; (b) goods, imports or exports of which is prohibited in respect whereof an option of payment of fine in lieu of confiscation has been given and (c) goods, liable to confiscation under any other provisions of the Customs Act in respect whereof an option to pay fine in lieu of confiscation is given.

21. Mr.Bharucha submitted that if it is held that the liability to pay duty under section 125(2) arises, the moment an order is made with an option to pay fine in lieu of confiscation even if the option is not exercised, then, it would lead to palpably absurd

results. For example, Mr.Bharucha submits, that where noxious drugs like Cocaine or Heroin are imported, the same being prohibited are liable to be confiscated absolutely and such goods cannot be released on payment of fine. Thus, owner of absolutely confiscated goods will not be liable to pay duty under section 125(2). On the other hand, if the goods imported are not per se noxious but are subject to restrictions, like import of special categories of steel, then, such goods are liable to be released on payment of fine in lieu of confiscation. If the contention of the revenue is accepted, the owner whose goods are confiscated absolutely would not be liable to pay duty, whereas, the owner whose goods are confiscated with an option to pay fine in lieu of confiscation would be liable to pay duty, even if the option is not exercised and the goods continue to remain as confiscated goods. He submits that if the contention of the revenue is accepted, then, the option given under section 125(1) would be meaningless. He submits that the word "in addition" in section 125(2) clearly suggests that the duty has to be paid along with the redemption fine. Redemption fine becomes payable only if the owner exercises the option to redeem the goods and, therefore, it must be held that in cases where the option is not exercised, neither the fine nor the duty is payable.

22. Relying upon various decisions of the Tribunal, Mr.Bharucha submitted that section 125(2) has been interpreted in several cases for more than a decade and in all those cases the Tribunal has consistently held that the liability to pay customs duty under section 125(2) arises only if the owner opts to redeem the goods on payment of redemption fine. Consistent with the earlier decisions, the Tribunal in the present case has held that the duty is not payable as the option is not exercised by the owner of the goods.

23. Relying upon an unreported Judgment of this Court in the case of Union of India V/s. Sir Harkisondas Marjorams Hospital (O.S. Writ Petition No. 388 of 2005 decided on 13th April, 2005), counsel for the importer submitted that this Court has held that if the owner is not interested in redeeming the goods, then the Customs Act does not create any liability to pay the customs duty. Accordingly, it is submitted that in view of the aforesaid binding decision of this Court, the contentions of the revenue cannot be accepted.

24. Dealing with the arguments advanced on behalf

the revenue, Mr.Bharucha submitted that Section 12 is a charging section and it does not authorise recovery of duties. The revenue can recover duty only under the machinery sections provided under the Act and not under the charging section 12. Relying upon the decision of the Apex Court in the case of **Somaiya Organics V/s. State of U.P.** reported in **2001(130) E.L.T.3 (S.C.)**, Mr.Bharucha submitted that under the taxing statutes the word "levy" and "collection" are not synonymous. If section 12 is construed to encompass within itself the provision for recovery of customs duty it will render the provisions of section 28 and section 125 of the Customs Act otiose or redundant. If it is held that section 12 empowers the revenue to recover duty, then it will render the limitation for recovery of duty prescribed under section 28 of the Customs Act nugatory. He submitted that it is well established in law that while interpreting a statute, effort should be made to give effect to each and every word used by the legislature. Relying upon the Judgment of the Apex Court in the case of **Nathidevi V/s. Radha Gupta** reported in **(2005) 2 S.C.C. 271**, Mr.Bharucha submitted that a construction which attributes redundancy to the words in the statute cannot be accepted. In the present case, the interpretation given to section 12 by the revenue if accepted, it will render sections 28 and

125(2) completely nugatory and, therefore, such a construction must be avoided.

25. Mr.Bharucha submitted that section 12 provides for levy of customs duty on import of goods and not on the owner or the importer. Under Section 126 of the Customs Act on confiscation the property in goods vest in the Central Government. In such a case, claiming duty under section 12 on the goods which are vested in the Central Government does not arise at all. This is because the taxable event in terms of section 12 is the import into or export of goods from India.

26. Dealing with the decision of the Apex Court in the case of Mediwell Hospital (supra), Mr.Bharucha submitted that the said decision has been expressly overruled by the Apex Court in the case of **Faridabad CT Scan V/s. D.G.Health** reported in **1997(95) E.L.T. 161 (S.C.)** and in the case of **Shri Sathya Sai Institute vs. Union of India** reported in **2003(158) E.L.T.675 (S.C.)** and, therefore, it is not open to the revenue to rely upon the said Judgment. He submitted that even otherwise, the ratio laid down in the Mediwell Hospital's case was with reference to the availability of the exemption notification 64/88 to a Diagnostic Centre run by a private individual purely on a

commercial basis and not with reference to the duty payable under Section 125 (2) of the Customs Act. He submitted that the Apex Court in the case of Mediwell Hospital (supra) has not held that the customs duty could be recovered from owners who did not comply with the conditions of the notification. The Apex Court has not held that the recovery provisions in the Customs Act viz. Section 28 and Section 125 should be given a bye. The Apex Court has not held that the recovery can be made under Section 12 of the Customs Act. Accordingly. Mr.Bharucha submitted that the reliance placed by the revenue on the decision of the Apex Court in the case of Mediwell Hospital is wholly misplaced.

27. Mr.Bharucha further submitted that the passing observations made by the Apex Court in the case of Mediwell Hospital (supra) regarding recovery of duty cannot be said to be obiter dicta or binding on this Court. In this connection, Mr.Bharucha relied upon the decision of this Court in the case of **Mohandas Issardas V/s. A.N.Sattanhathan** reported in **LVI Bom L.R.1156** wherein it was inter alia held thus :-

> " Now, an obiter dictum is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the

> determination of the tribunal. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be ratio decindi; the opinion of the tribunal on the question which was not necessary to decide the case would be only an obiter dictum."

Accordingly, Mr.Bharucha submitted that assuming that the decision in the case of Mediwell Hospital (supra) still holds the field, even then the passing observations made in the said decision are not binding on this Court.

28. Mr.Bharucha further submitted that the Apex Court in the case of Jagdish Cancer & Research Centre (supra) did not address itself to the issue as to whether the duty is payable even if an option of redemption is not exercised. He submitted that the issue before the Apex Court in that case, was regarding the applicability of section 28 in respect of the goods confiscated under section 111 and 112 of the Customs Act. He submitted that the duty in respect of goods confiscated under section 111 & 112 can be recovered under section 125 (2), only if the owner exercises the option to redeem the goods. On exercising the option to redeem the goods, the owner becomes liable to pay the duty thereon in addition to fine in lieu of confiscation. Such a duty is an integral part of the

process of confiscation and for recovering that duty the limitation prescribed under section 28 would not apply on redemption. Where the confiscated goods are not redeemed, the question of recovery of duty under section 125 does not arise because the recovery of duty under section 125 is inextricably linked to confiscation. Accordingly, it is submitted that the ratio laid down by the Apex Court in the case Jagdish Cancer which deals with the applicability of section 28 is not applicable to the facts of the present case.

29. Mr.Bharucha further submitted that even if it is held that non compliance of post importation conditions set out in the Notification is a continuing default, it can give rise to (a) liability to pay penalty under section 112; (b) liability to confiscation with fine and duty under section 125(2) if the option of redemption is exercised and (c) liability to pay duty if so required under the terms of Notification and liability to pay duty under section 28 within the limitation prescribed therein. Admittedly, the show cause notice is issued beyond the period of limitation prescribed under section 28. Therefore, duty cannot be recovered under section 28. The exemption notification does not contain any clause for recovery of duty if the conditions of the notification

are not fulfilled. Duty under section 125(2) can be recovered only if the option of redemption is exercised. In the present case, the option is not exercised and, therefore, the Tribunal was justified in upholding the contention of the owner that the duty is not recoverable in the present case. Accordingly, Mr. Bharucha submitted that the appeal filed by the revenue be dismissed.

30. Mr.Shreedharan learned counsel appearing on behalf of the Foundation, while adopting the arguments of Mr.Bharucha, submitted that in the present case, the liability to pay duty can neither be sustained under section 12 nor under section 28 of the Customs Act and if the case of the revenue falls within the four corners of section 125(2) then only the revenue would be entitled to recover the duty payable on the goods in question.

31. Mr.Shreedharan submitted that section 125(2) as amended by the Customs (Amendment) Act, 1985 is enacted only to particularise the person who is liable to pay duty and fine in case the goods are redeemed. He submitted that section 125(2) does not create automatic liability to pay duty even if the goods are not being redeemed. He submitted that if the submission of the

revenue that duty shall be payable under section 125 irrespective of the exercise of option to redeem the goods on payment of fine in lieu of confiscation is accepted, then the term ‘in addition to’ in section 125 (2) would be rendered redundant and otiose. He submitted that if the option to redeem the goods is not exercised, then, the goods remain confiscated and in that event whole of section 125(2) would be inapplicable.

32. According to Mr.Shreedharan, the expression ‘shall be liable’ in section 125(2) does not refer to absolute obligation. The word ‘liable’ in section 125 (2) indicates that there is a possibility of attracting obligation to pay duty. Such possibility will occur or happen if the goods are being redeemed. Thus, the word ‘liable’ in section 125(2) is decisive of the matter as it establishes that if the goods are not redeemed, possibility of payment of duty does not arise at all. He submitted that under section 125(2) it is not the importer but only the owner or the person in possession of the goods is liable to duty conclusively establishes that the liability to pay duty in terms of section 125(2) will arise only if the goods are redeemed.

33. Mr.Shreedharan further submitted that under

section 47(1) of the Customs Act, 1962 customs duty is payable only when clearance of the goods is sought from the customs control. Where the goods are not sought to be cleared from the customs, they may be disposed off under section 48. In that case, duty will not be payable merely because of the importation of goods. Therefore, if the goods are still lying in the customs control on account of absolute confiscation or on account of non exercise of the option to redeem goods, the duty will not be payable at all. He submitted that the fact that the imported goods have been put to use for a considerable period is wholly irrelevant, because, section 125 does not make any reference to the kind or nature of goods. Interpretation and applicability of section 125(2) will not vary whether the goods are confiscated before or after clearance or whether the confiscated goods are used goods or unused goods.

34. Relying upon the decision of the Apex Court in the case of Re: Sea Customs Act , 1878 reported in A.I.R. 1963 S.C. 1760 and the decision in the case of **Chhotabhai Jethabhai Patel & Co. V/s. The Union of India** reported in **A.I.R.1952 Nagpur, 139**, Mr. Shreedharan submitted that as per the scheme of the Customs Act all duties are liable to be collected

before clearance of the goods and there is no provision in the Act in respect of the liability arising after the clearance of the goods. To overcome this legal hurdle, the legislature has provided for execution of bonds under section 143 of the Customs Act. Moreover, the Central Government has followed consistent practice of incorporating conditions of bond or undertaking in cases involving fulfilment of post importation conditions. In the present case, neither any bond is executed under section 143 nor the notification No.64 of 1988 contains any clause for recovery of duty. As a result, in view of the lacuna, the duty is not recoverable even though there is breach of the conditions of the notification. If there is a lacuna in the statute, the Court cannot fill in the lacunae.

35. Mr.Shreedharan further submitted that unlike in the Income Tax Act, 1961, there is no provision specially enacted under the Customs Act to take care of situations arising on account of non fulfilment of the conditions after clearance of goods. He submitted that even if the duty is leviable due to non fulfilment of the conditions required to be fulfilled after clearance, if there is no machinery for collection or assessment, then such levy is unenforceable. In this connection, he relied upon the decisions in the case of

**Elphinstone Spinning and Weaving Mills Co.Ltd. V/s. C.I.T.** reported in **1955 (28) I.T.R. 811 (Bom)**, **N.A.Mody V/s. C.I.T.** reported in **A.I.R. 1967 S.C. 193**, **Puri Municipal Council and Ors. V/s. India Tobacco Co. Ltd.** reported in **(1996) 1 Supreme Court 293** and **Kolhapur Canesugar Works Ltd. V/s. Union of India** reported in **2000 (119) E.L.T. 257 (S.C.)**.

36. Lastly, Mr.Shreedharan submitted that though several grounds were taken in the appeal the Tribunal decided the appeal on only one issue and if the Court disagrees with the view of the Tribunal, then the appeal be restored to the file of the Tribunal so that the matter can be heard on other grounds raised in the appeal filed by the assessee before the Tribunal.

37. We have carefully considered the submissions made by the counsel on both the sides.

38. Before dealing with the merits of the case, we may refer to the relevant provisions of the Customs Act which read thus:-

> S.12. **Dutiable goods:-** (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or

exported from, India.

(2) .....

S.47. **Clearance of goods for home consumption-** (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

2. .....

111. **Confiscation of improperly imported goods, etc.** - The following goods brought from a place outside India shall be liable to confiscation:-

.....

.....

.....

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

125. **Option to pay fine in lieu of confiscation.-** (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of

imported goods the duty chargeable thereon.

[(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.]

39. In both the cases before us, the respondents who are the importers and are in possession of the goods (hereinafter referred to as 'owners') had imported medical equipments which were dutiable. However, on assessment the medical equipments were allowed clearance without payment of customs duty under notification No.64/88 with an obligation to fulfil the conditions attached to the said Notification after clearance of the goods. It is an admitted fact that, but for the exemption notification, the duty liability on the imported goods were Rs.1,65,24,050/- and Rs.4,40,31340/- respectively. As per the notification, the obligations the owners had to fulfill after clearance of the goods were inter alia that they

(a) shall give free treatment on an average to atleast 40% of the their Outdoor patients,

(b) shall give free treatment to all Indoor patients belonging to families with a income of less than Rs.500/- p.m., and

(c) shall keep for that purpose atleast 10% of the hospital beds reserved for such patients.

It is not in dispute that in the present case, the above post clearance conditions of the Notification No.64/88 have not been fulfilled. As a result, the owners have not earned the benefit of the exemption Notification and consequently the duty has become recoverable. However, it was contended and upheld by the Tribunal that, where the goods confiscated under section 111(o) are allowed to be redeemed on payment of fine in lieu of confiscation then duty on such goods is payable under section 125(2) only if the option to redeem the goods is exercised and not otherwise.

40. Although counsel on both sides have argued extensively regarding the applicability of various recovery provisions contained in the Customs Act, in our opinion, the only question to be considered in these appeals is, where the goods confiscated under section 111(o) are allowed to be redeemed on payment of fine in lieu of confiscation imposed under section 125(1), whether the duty under section 125(2) is payable irrespective of the exercise of the option or is it payable along with fine after the option is

exercised ? According to the Tribunal, the duty demand under section 125(2) can be sustained only if the option is exercised and not otherwise. In other words, the finding of the Tribunal is that the owner of the confiscated goods is not liable for payment of duty under section 125(2) if he does not exercise the option of redeeming the goods by paying the fine in lieu of confiscation imposed under section 125(1).

41. We find it difficult to accept the above interpretation of section 125(2). It is well established in law that the taxing statutes have to be construed strictly and unless the literal meaning leads to anomaly or absurdity, the golden rule of literal interpretation should be adhered to. Literal meaning of section 125(2) is that, whenever the goods liable to be confiscated under the Customs Act are allowed to be redeemed by giving an option to pay fine in lieu of confiscation imposed under section 125(1), the owner of such goods or the person referred to in section 125(1) shall, in addition to the fine be liable to any duty and charges payable in respect of such goods. In other words, under section 125(2), the duty payable on the confiscated goods has to be paid on imposition of fine in lieu of confiscation and it is immaterial whether such option is exercised or not.

42. It is contended that if the above literal interpretation of section 125(2) is accepted, then the absurd situation would be that in every case, the moment an order of confiscation is made with an option to pay fine in lieu of confiscation, the owner would have to pay duty even if the option to redeem the goods is not exercised. The submission is that, where the option to redeem the goods is not exercised the goods vest in the government, in such a case if section 125(2) is read literally, then the absurd situation would be that though the goods have vested in the government the owner has to pay duty on such goods.

43. There is no merit in the above contention. What section 125(2) contemplates is that, where fine in lieu of confiscation is imposed, the owner of such goods or the person referred to in section 125(1) shall also pay duty and charges payable on such goods. It must be noted that it is the imposition of fine and not the payability of the fine that is relevant for the purposes of section 125(2). No doubt, the fine imposed under section 125(1) becomes payable only if the option of redemption is exercised. However, the legislature has provided in section 125(2) that it is on imposition of fine under section 125(1) the duty and charges payable on such goods has to be paid. Therefore,

irrespective of the fact that the fine in lieu of confiscation has become payable or not, on imposition of fine in lieu of confiscation under section 125(1), the duty and charges payable on such goods has to be paid as per section 125(2).

44. It must be noted that the word ‘payable’ is used in section 125(2) to avoid any anomaly or absurdity. The word ‘payable’ is a descriptive word, which ordinarily means ‘that which must be paid or is due or may be paid’ but its correct meaning has to be determined in the context it is used. In the context of section 125(2), the word ‘payable’ means duty which has become due and payable. That means if the duty is payable on imposition of fine under section 125(1), then the duty has to be paid on such imposition of fine. If duty is payable at a later point of time, then it has to be paid when due and payable. Under the provisions of the Customs Act, the imported goods are not allowed clearance for home consumption unless the duties of customs as assessed and other charges payable under the Act are paid. Thus, the duties of customs leviable on importation gets crystalised on assessment and has to be paid before seeking an order for clearance of the goods. Where the imported goods are confiscated before an order for clearance is made with an option to redeem the goods on payment of fine in

lieu of confiscation, then the duty on such goods does not become payable on imposition of fine in lieu of confiscation but has to be paid before seeking clearance of the goods. In such a case if the clearance of the goods is not sought for, the question of paying duty does not arise at all.

45. However, in cases where the dutiable goods are cleared for home consumption without payment of duty and are confiscated subsequently under section 111(o) with an option to redeem the same on payment of fine in lieu of confiscation imposed under section 125(1), then, the duty on such goods as per section 125(2) becomes payable, on imposition of fine in lieu of confiscation. The reason is that, in such cases, the clearance of the goods was subject to fulfilment of the conditions and if those conditions are not fulfilled, the benefit of the Notification would not be available and consequently, duty in respect of such goods becomes payable if allowed to be redeemed by imposition of fine in lieu of confiscation. In such cases, the liability to pay duty is not dependant upon the owner or the person referred to in section 125(1) exercising the option of redeeming the goods. In such cases, duty becomes payable on imposition of fine in lieu of confiscation and the same has to be paid on passing an

order under section 125(1). In such cases fine may not be payable on imposition of fine, however, duty has to be paid on passing an order under section 125(1). It is pertinent to note that the duty on the imported goods has to be paid by the importer before seeking clearance of the goods under section 47. However, section 125(2) provides that the duty and charges payable on goods confiscated with an option to redeem the same on payment of fine in lieu of confiscation imposed under section 125(1), has to be paid by the owner or the person referred to in section 125(1). This differentiation clearly shows that section 125(2) has been enacted to enforce the duties recoverable after the clearance of the goods. Once the goods are cleared from the customs control, the goods may change hands and, therefore, the legislature in such cases has thought it fit to recover the duty payable after the clearance of the goods from the owner or the person referred to in section 125(1) of the Customs Act.

46. It is pertinent to note that neither the challenge to the duty liability nor the challenge to the order of confiscation was pressed by the owners before the Tribunal. In other words, in the present case, the confiscation of the goods as well as the liability to pay duty is accepted by the owners. The

only argument advanced before the Tribunal was that, because the owners have not exercised the option of redeeming the goods the duty is not payable. In our view, where the dutiable goods are confiscated under section 111(o) with an option to pay fine in lieu of confiscation, then, whether the owner has exercised the option of redemption or not the duty becomes payable on passing an order under section 125(1). In other words, where duty becomes payable as a consequence of the confiscation order passed under section 111(o), then on passing an order under section 125(1) duty has to be paid on such goods, irrespective of the fact that the owner has exercised the option or not and whether the goods were put to use or not.

47. The contention that there is no provision under the Customs Act to recover duty liability arising on account of the non fulfilment of the post clearance conditions of the exemption notification is also without any merit. As stated earlier, section 111(o) read with section 125 totally negates the above contention.

48. To accept the contention that the liability to pay duty arises only if the owner exercises the option of redemption, would mean reading those words into section 125(2). It is well established in law that the rules of interpretation do not permit the Courts to

read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. As stated earlier, literal construction of section 125(2) avoids anomaly or absurdity and if the interpretation of section 125(2) put forth by the Tribunal is accepted, then it would defeat the very purpose of enacting section 125(2) and thereby defeating the ends of justice. In this view of the matter, the construction of section 125(2) adopted by the Tribunal cannot be accepted.

49. It is true that the Apex Court in the case of Mediwell Hospital and Health Care Pvt. Ltd. (supra) and Jagdish Cancer and Research Centre (supra) was not called upon to interpret section 125(2) of the Customs Act. However, we can draw support from the observations made therein. In the case of Mediwell Hospital (supra), the Apex Court inter alia held thus:-

> " Needless to mention the Government has granted exemption from payment of customs duty with the sole object that 40% of all outdoor patients and entire indoor patients of the low income group whose income is less than Rs.500/- p.m. would be able to receive free treatment in the Institute. That object must be achieved at any cost, and the very authority who have granted such certificate of exemption would ensure that the obligation imposed on the persons availing of the exemption notification are being duly carried out and on being satisfied that the said obligations have not been discharged they can enforce realisation of the customs duty from them. "

Similarly in the case of Jagdish Cancer &

Research Institute, the Apex Court inter alia held thus:-

> " Whenever an order confiscating the imported goods is passed, an option, as provided under sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to sub-section (2) of Section 125, the person "shall in addition be liable to any duty and charges payable in respect of such goods". A reading of sub-sections (1) and (2) of Section 125 together makes it clear that the liability to pay duty arises under sub-section (2) in addition to the fine under sub-section (1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to sub-section (2) of section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc. The order for payment of duty under Section 125(2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in *Mohan Meakins Ltd. V. Commissioner of Central Excise, Kochi, 2000(115) E.L.T. 3 (S.C.) = (2001) 1 SCC 462* wherein it has been observed in Para 6 "... Therefore, there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or change payable on such goods apart from the redemption find that he intends to levy under sub-section (1) of that section". In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable. "

Although some issues decided in the case of Mediwell Hospital have been overruled by the Apex Court

in the case of Faridabad CT Scan (supra) and Sathya Sai Institute (supra), the above observations regarding the liability to pay duty under section 125(2) have not been overruled by the Apex Court. Moreover, the above observations made in the Mediwell Hospital case has been reiterated by the Apex Court in the case of Jagdish Cancer Research Institute (supra). Thus, our interpretation of section 125(2) is supported by the aforesaid observations of the Apex Court.

50. Strong reliance was placed on an unreported Judgment of this Court in the case of Sir Harkisondas Narottam Hospital (supra). The observation made therein to the effect that if the owner is not interested in redeeming the goods, then the Customs Act does not create any liability to pay the customs duty is only a prima facie observation made in the context of an issue relating to pre-deposit. Therefore, it cannot be said that in the aforesaid case, this Court has held that in each and every case, if the owner declines to exercise the option of redeeming the goods, the customs duty would not be payable.

51. It is true that the Tribunal in several cases has held that the duty is not payable under section 125(2) if the option of redemption is not exercised. However, our view, it is not a correct interpretation. It was contended that the show cause notice issued in

Customs Appeal No.17 of 2005 did not seek to recover duty and, therefore, the duty demand cannot be sustained. As stated earlier, where the liability to pay duty is consequential to confiscation then on confiscation if the goods are permitted to be redeemed by imposing fine, then on such imposition of fine duty becomes payable. Therefore, the fact that the duty was not specifically demanded in the notice would not matter. The contention that where the option is not exercised, the goods remain vested in the government and in that event section 125(2) is not attracted is also without any merit. As stated earlier, in respect of the goods confiscated under section 111(o) with an option to pay fine in lieu of confiscation the duty becomes payable on passing an order under section 125(1). In such a case, whether the option is exercised or not is wholly irrelevant. Admittedly, the only issue canvassed before the Tribunal was regarding duty liability under section 125(2) and, therefore, the question of remanding the matter for deciding the other issues raised in the appeal before the Tribunal does not arise.

52. For all the aforesaid reasons, we are of the opinion that the Tribunal was in error in holding that the liability to pay duty on the goods confiscated under section 111(o) with option to pay fine in lieu of

confiscation imposed under section 125(1) arises only if the owner exercises an option of redeeming the goods. In our opinion, where the goods are confiscated under section 111(o) with an option to redeem the goods on payment of fine in lieu of confiscation imposed under section 125(1), the revenue is entitled to recover the duty payable on such goods on passing an order under section 125(1) and it is wholly irrelevant as to whether the owner has exercised the option to redeem the goods or not. The substantial questions of law raised in these appeals are answered accordingly.

53. In the result, both the appeals succeed. The impugned orders passed by the Tribunal are quashed and set aside. However, there will be no order as to costs.

**(R.M.LODHA, J.)**

**(J.P.DEVADHAR, J.)**